

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AUG 28 2012

JAMES R. LARSEN
SPOKANE, WASHINGTON DEPUTY

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3 Eastern District of Washington
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
UNITED STATES OF AMERICA, }
Plaintiff, } Case No. PO-11-005-CI
vs. }
BRIAN DUNNELL } PRE-TRIAL DIVERSION
Defendant. } AGREEMENT

Plaintiff United States of America, by and through Michael C. Ormsby, United States Attorney, Tyler H.L. Tornabene, Assistant United States Attorney, and Matthew Reiner, Legal Intern, United States Attorney's Office for the Eastern District of Washington, and Defendant BRIAN DUNNELL, and the Defendant's counsel, Amy H. Rubin, for the Federal Defenders of Eastern Washington and Idaho, agree to the following Pre-Trial Diversion Agreement. The United States and the Defendant agree that the Court should continue the instant case until August 28, 2014, on the charges of:

Operating a vehicle while under the influence of alcohol in violation of 38 C.F.R. § 1.218(b)(15)

The United States and the Defendant agree that this case shall be continued until August 28, 2014, and thereafter dismissed with prejudice, provided the Defendant abides by the conditions and requirements herein outlined.

FACTUAL BACKGROUND

The United States and the Defendant stipulate and agree that the following facts are accurate; that the United States could prove these facts beyond a reasonable doubt at trial; and that these facts can be used as evidence against the Defendant per the terms of this agreement.

On May 14th, 2011, Sergeant Ian McKinley was patrolling the east parking lots and roads of the VA Medical Center in Spokane, WA. Sergeant McKinley observed a silver Ford Mustang pull into the VA facility and drive west on Memorial Circle. The vehicle drove up behind Sergeant McKinley's vehicle and then made a sharp left turn without the use of a turn signal. Sergeant McKinley then witnessed the vehicle making a three point turn at the intersection of Freedom and Memorial Circle, in doing so the vehicle was facing the wrong direction on a posted one way street. While making the turn the vehicle was braking and accelerating more abruptly than normal. After making the turn Sergeant McKinley followed the vehicle for approximately 50 feet, during that time Sergeant McKinley noticed that the passenger seated in the rear seat on the drivers side was leaning into the center of the vehicle. Sergeant McKinley could not see any seatbelt restraint on the passenger. At this point Sergeant McKinley decided to stop the vehicle based upon the illegal turn and lack of passenger restraint.

Sergeant McKinley approached the vehicle from the drivers side and noticed that the rear passenger was unrestrained. As Sergeant McKinley approached the vehicle he notice the smell of alcohol coming from the vehicle. Sergeant McKinley made contact with the driver, stated his name and asked where the driver was headed. The driver of the vehicle did not respond to the inquiry and Sergeant McKinley asked the question again. Again the driver did not respond, Sergeant McKinley asked for the driver's license. The driver was holding his license in his hand, however he reached over towards the glove box. Sergeant McKinley asked what he was reaching for and the driver did not respond to the question. Once the driver had produced his license he was identified as Brian

1 DUNNELL. Sergeant McKinley asked DUNNELL if he was still living at the
2 address listed on his license, DUNNELL did not reply to the question. Sergeant
3 McKinley then noticed that DUNNELL's eyes were bloodshot and watery.
4 Sergeant McKinley repeated his question and DUNNELL pointed a small
5 flashlight at Sergeant McKinley and stated in slurred speech "Right there."

6 Sergeant McKinley asked DUNNELL to step out of the vehicle, after an
7 initial refusal DUNNELL complied with the direction. After exiting the vehicle
8 Sergeant McKinley asked DUNNELL if he had any weapons on him, DUNNELL
9 reached into his pocket. Sergeant McKinley then placed DUNNELL in handcuffs
10 for officer safety and conducted a pat down of his outer clothing for weapons.
11 Sergeant McKinley recovered a four inch folding blade knife from his left pocket.
12 Sergeant McKinley was able to discern that there was a smell of alcohol coming
13 from DUNNELL, and asked him if he would be willing to submit to a breathalyzer
14 or other field testing. DUNNELL replied "Are you deaf?" Sergeant McKinley
15 said "I'm not sure what you mean by that, will you take the tests or not?"
16 DUNNELL stated, "Not without my attorney present." Sergeant McKinley
17 informed DUNNELL that he could refuse, however refusal could result in a
18 suspension of his driving privileges, and could be used against him in court.
19 DUNNELL interrupted and stated, "I'm not doing anything without my attorney
20 present."

21 Sergeant McKinley placed DUNNELL under arrest for driving under the
22 influence of alcohol. DUNNELL was, in fact, driving under the influence of
23 alcohol when he was stopped by Sergeant McKinley on May 14, 2011. Sergeant
24 McKinley informed DUNNELL what he was under arrest for and as he had
25 already expressed interest in seeking counsel did not question him further.
26 DUNNELL did make several spontaneous utterances, "I'm not that bad." and "I
27 thought I was driving under the influence of stupidity."

28

1 Prosecution in the Eastern District of Washington for this offense shall be
2 continued until August 28, 2014, and thereafter dismissed with prejudice,
3 provided the Defendant abides by the conditions and requirements herein outlined.

4 **ACCEPTANCE OF PRE-TRIAL DIVERSION AND**
5 **STIPULATION OF FACTS**

6 The Defendant hereby:

- 7 1. Accepts and agrees to pursue and complete the terms and conditions of this
8 Pre-Trial Diversion Agreement (“Agreement”);
9 2. Understands that if he fails or neglects to comply with any part of the terms
10 and conditions of the Agreement, then the Court will hold a hearing to
11 determine whether judgment should be entered on the charges of Operating
12 a vehicle while under the influence of alcohol in violation of 38 C.F.R. §
13 1.218(b)(15). After the hearing, the Court will either order that he continue
14 with the conditions of his pre-trial diversion, order additional conditions, or
15 be removed from pre-trial diversion and enter judgment on the charges of
16 Operating a vehicle while under the influence of alcohol in violation of 38
17 C.F.R. § 1.218(b)(15).
18 3. Agrees that if the Court revokes the order granting this pre-trial diversion,
19 the facts from the Factual Background above and any written officer reports
20 and any attachment thereto will be admissible as evidence to be used to
21 support a finding of guilt when the Court enters judgment. He understands
22 that by agreeing to this process, he is giving up certain Constitutional rights.
23 He specifically acknowledges that he is giving up the right to a trial, the
24 right to testify or not to testify, the right to question witnesses, the right to
25 call witnesses in his own behalf, and the right to present evidence or a
26 defense;
27 4. Understands that he is entitled to a trial that would determine whether the
28 United States could prove him guilty of the instant charge beyond a

1 reasonable doubt. He does hereby, voluntarily and with knowledge of the
2 above rights, waive his right to a trial of this case by the Court pursuant to
3 paragraph three (3) above;

- 4 5. Agrees to report any potential violation of the conditions listed below to the
5 United States Attorney's Office for the Eastern District of Washington
6 through the Federal Defenders of Eastern Washington and Idaho within one
7 (1) business day.

8 **CONDITIONS OF UNSUPERVISED PRE-TRIAL DIVERSION**

9 The Defendant must abide by the following conditions and requirements:

- 10 1. Defendant shall pay a forfeiture in the amount of \$1000 on or
11 before August 1, 2014.

12 2. Defendant shall provide the United States Attorney's Office of the
13 Eastern District of Washington a summary verifying that half of the
14 forfeiture has been paid as of August 1, 2013.

15  3. ~~AVB~~ Defendant shall provide the United States Attorney's Office of the
16 Eastern District of Washington written documentation verifying the
17 ~~Central Violations Bureau~~'s receipt of the \$1000 forfeiture by
18 August 1, 2014.

*APR
Clerk's
Office
7/1/25*

- 19 4. Defendant shall complete one hundred (100) hours of verifiable
20 community service by August 1, 2014. Defendant shall complete
21 these community service hours at a 501(c)(3) organization with which
22 neither he nor his immediate family has any past or current affiliation.

23 5. Defendant shall provide the United States Attorney's Office of the
24 Eastern District of Washington written documentation verifying that
25 half of the community service hours (50) has been completed as of
August 1, 2013.

26 6. Defendant shall provide written documentation verifying his
27 completion of the community service hours. Written documentation
28 must be sent to the United States Attorney's Office for the Eastern

District of Washington within thirty (30) days of completion. This documentation must include the name, address, and telephone number of the organization, along with a daily log of recorded hours signed by a representative or agent of the organization.

7. Defendant shall complete an alcohol assessment at his own cost at a licensed alcohol treatment institution no later than October 30, 2012. The Defendant shall fully comply with any treatment program and all requirements set for him by the licensed alcohol treatment institution.
8. The Defendant shall provide documentation from licensed alcohol treatment institution to the United States Attorney's Office for the Eastern District of Washington no later then November 15, 2012 verifying the status of his treatment.
9. Defendant shall not violate, be charged with, or be convicted of any criminal violations under federal, state, or local law on or before August 28, 2014.

If the Defendant complies with all the obligations mentioned above, no prosecution for the offense set out in the Factual Background section of this Agreement will be instituted in the Eastern District of Washington, and the charges will be dismissed with prejudice on August 28, 2014. Should there be a violation of the terms of this Agreement, however, and the Agreement is revoked, a conviction for the charged offense may be imposed pursuant to the procedures outlined herein. If a conviction occurs, the Defendant understands he will be subject to a sentencing which may include up to six months imprisonment and/or a \$5000 fine. The Defendant will not be supervised by the United States Probation Office during the period of diversion.

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2 **ADVICE AND ACKNOWLEDGMENT OF DEFENDANT'S RIGHTS**

3 I, BRIAN DUNNELL, understand and acknowledge I have the
4 following rights:

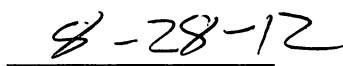
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- 6 1. The right to a speedy and public trial in the place where the crime is
7 alleged to have been committed;
- 8 2. The right at trial to question witnesses who testify against me;
- 9 3. The right at trial to call witnesses to testify for me;
- 10 4. The right to present evidence and a defense;
- 11 5. The right to appeal a judgment of guilt.

12 By entering into this Agreement I understand that I am knowingly,
13 intelligently, and voluntarily, waiving these rights. I further understand that
14 by continuing these charges until August 28, 2014, I am agreeing to follow
15 the procedures outlined in this Agreement.

16

17 I, BRIAN DUNNELL, hereby state that I have read this document in
18 its entirety. I understand the conditions of my pre-trial diversion and agree
19 that I will comply with those conditions.

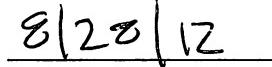
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22 BRIAN DUNNELL
23 Defendant

Date

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26 Amy Rubin
27 Attorney for Defendant

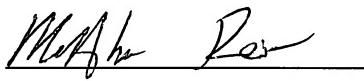
Date

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4 Tyler H.L. Tornabene
5 Assistant United States Attorney

6 8-28-12
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Date

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10 Matthew Reiner
11 Petty Offense Legal Intern

12 8/28/2012
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Date

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UNITED STATES OF AMERICA,

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Defendant.

} Case No. PO-11-005-CI

~~PROPOSED~~
PRE-TRIAL DIVERSION
AGREEMENT

Upon consideration of the parties' Pre-Trial Diversion Agreement, and being fully advised of the facts and circumstances of this case, the Court finds the Defendant has agreed to comply with the terms and conditions of the Pre-Trial Diversion Agreement; that the Court finds the Defendant has acknowledged the admissibility of the stipulated facts in any criminal hearing on the underlying offense or offenses held subsequent to revocation of the order granting pre-trial diversion; that the Defendant's statements were made knowingly and voluntarily; and that the Defendant has knowingly and intelligently waived his Constitutional and statutory rights to a speedy trial, to question those witnesses against him, to call witnesses on his behalf, and to present evidence or a defense at trial.

NOW THEREFORE, IT IS HEREBY ORDERED:

1. The Defendant is accepted for pre-trial diversion;
2. The Defendant shall comply with all the terms and conditions as set forth in the Pre-Trial Diversion Agreement;

3. If the Court finds that the Defendant violated any term of the Pre-trial diversion Agreement, the Court shall enter judgment pursuant to the procedures outlined in the agreement.
 4. The Defendant shall not be supervised by the United States Probation Office during the diversion period.

Cyan 08-28-2012

HON. Cynthia Imbrogno
United States Magistrate Judge

Date